Petition

81-575

Case No.--

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CARLOS RUIZ, RIGOBERTO ROJAS, and ARMANDO ORTIZ, *Petitioners*,

versus

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the fifth amendment due process rights and the sixth amendment fair trial rights of the Petitioners were violated when the trial court found sufficient proof of an agreement to sustain a conviction for conspiracy to distribute marijuana when, in fact, the evidence failed to show that any distribution scheme existed or was even contemplated.

II. Whether Ruiz' sixth amendment right to a fair trial was violated when the trial court allowed the government to introduce two guns into evidence against him, despite the lack of any allegation in the indictment pertaining to the use or possession of firearms.

III Whether Ruiz' sixth amendment right to a fair trial was violated when the trial court denied his Motion for Severance, thus depriving him of material exculpatory testimony of his Co-defendant.

IV. Whether the trial court's error

in submitting written jury instructions violated the Petitioners' sixth amendment right to a fair trial.

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JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 15, 1981. A timely Petition for Rehearing and a timely Petition for Rehearing en banc were denied without opinion on August 10, 1981. This Petition for Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State wherein the crime shall have been committed . . .

STATEMENT OF THE CASE AND FACTS

The Petitioners were indicted by the Grand Jury for the Southern District of Florida on February 28, 1979. Each and all were charged in Count I with conspiring to distribute marijuana, in violation of 21 U.S.C. § 846, and in Count II with possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). Trial by jury commenced before the Honorable James C. Paine on January 2, 1980, with the jury returning verdicts of guilty on both counts as to all Petitioners. The Petitioners appealed their convictions to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the convictions, but held that the special parole term imposed on Perez, a Co-defendant of the Petitioners, was required to be vacated. United States v. Perez, ___ F.2d 7969 (5th Cir. June 15, 1981). The Court of Appeals denied the Petition for Rehearing in an order dated August 10, 1981.

At approximately 5:00 p.m. on February 11, 1979, Agent Don Meyers of the Palm Beach County Sheriff's Office observed the vessel "Magnificent" docked in the canal at the rear of 11317 Avery Road in Palm Beach County. The vessel appeared to be riding low in the water.

Agent Meyers returned at approximately 7:30 p.m., accompanied by DEA Agent Carter Osleber. They went to the back yard of a neighbor's property and, from this position, were able to view the vessel and portions of the backyard of the Avery Road property. Although it was a partially cloudy night and no lights were on in the house or the vessel, the agents stated that they could see fairly well.

The agents testified that they observed a conveyor system leading from the boat to the house. Co-defendant, Perez was seen placing burlap covered bales onto the conveyor system. Agent Osleber smelled the odor of marijuana upon approaching the boat.

The agents testified that they observed Ortiz pushing the bales along the conveyor system towards Rojas, who would push them

inside. Ortiz, Ruiz, and Rojas were wearing blue jumpsuits. They noticed the presence of the agents, after which they ceased their activity and proceeded to disperse.

The agents entered the yard and apprehended Ortiz. Rojas dived into the rear door of the house and was immediately pulled out by Agent Osleber.

After taking Perez into custody, the agents entered the hosue. Ruiz was found in a bedroom closet. As the agents entered the bedroom, they ordered Ruiz to raise his hands. Ruiz, initially in a crouched position, raised his hands in compliance, but was struck by Agent Osleber with a gun butt and pulled from the closet before he could complete this action. Two loaded weapons were subsequently found on the closet shelf.

Despite the fact that neither agent could be sure that Ruiz was reaching for a weapon and that the government failed to introduce evidence showing that the guns were registered to Ruiz, that his fingerprints were on them, or that he had any knowledge of their presence

(i.e., through ownership of,or residence in, the house), the guns were introduced, over objection, into evidence against Ruiz only. Ruiz' Motion in Limine, seeking suppression of the guns, had been previously denied.

At the September 4, 1979 suppression hearing, Ruiz testified that he had arrived at the house at approximately 7:00 p.m. Because he was intoxicated, he went into the bedroom and passed out, until he was awakened by the shouts of the agents, whereupon he hid in the bedroom closet, unaware of the presence of weapons on the closet shelf.

Rojas also testified at the suppression hearing, stating that Ruiz looked sick when he arrived and went to bed shortly thereafter. Rojas testified that he, rather than Ruiz, was at the back door of the house bringing the bales inside. He testified that Ruiz never went outside the house.

After the Government rested its case, Ruiz moved for a severance, proffering the exculpatory testimony given by Rojas at the suppression hearing. With the jury absent,Ruiz

called Rojas as a witness, but Rojas invoked his fifth amendment privilege to remain silent. Ruiz' Motion for Severance was denied.

Over the Petitioner's objections, the Court submitted a set of written instructions to the jury.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AMENDMENT DUE PROCESS RIGHTS AND THE SIXTH AMENDMENT FAIR TRIAL RIGHTS OF THE PETITIONERS WERE VIOLATED WHEN THE TRIAL COURT FOUND SUFFICIENT PROOF OF AN AGREEMENT TO SUSTAIN A CONVICTION FOR CONSPIRACY TO DISTRIBUTE MARIJUANA WHEN, IN FACT, THE EVIDENCE FAILED TO SHOW THAT ANY DISTRIBUTION SCHEME EXISTED OR WAS EVEN CONTEMPLATED.

To support a conviction for conspiracy, there must exist proof beyond a reasonable doubt that a conspiracy existed. The gravamen of a conspiracy is the agreement. Ianelli v. United States, 420 U.S. 770 (1975). Furthermore, the Defendants have to know of, and voluntarily join in, the conspiracy. United States v. Rodriguez,

585 F.2d 1234 (5th Cir. 1978). The correct standard for review is whether there was substantial evidence of a conspiracy, it being understood, of course, that the evidence is to be viewed in the light most favorable to the government. United States v. Malatesta, 590 F.2d 1379 (5th Cir. 1979). The evidence against the Petitioners in the instant case, viewed in the light most favorable to the government, pursuant to Glasser v. United States, 315 U.S. 60 (1942), can be summarized briefly:

The Petitioners, using a conveyor belt system, were apprehended while unloading bales of marijuana from a boat to a house.

Nowhere does the evidence show, either by statements, acts,or other circumstances, that the Petitioners had knowledge of, or the requisite intent to be, a member of a conspiracy to distribute marijuana. The record supports, at best, a finding that the Petitioners were in possession

of the marijuana, by virtue of their efforts in unloading it. Evidence as to any plan or agreement to distribute the marijuana after it was unloaded clearly does not exist.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, defines "distribute" as meaning" to deliver, 21 U.S.C. §802(11). The term "deliver" or "delivery" is defined as "the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship." Section 802 (8).

While an attempt to distribute under 18 U.S.C. §841 can be inferred from the quantity of marijuana involved, see, e.g. United States v. Perry, 480 F.2d 147 (5th Cir. 1973), the record lacks any evidence showing that any of the Petitioners were to participate in the delivery of the marijuana to another party. There simply is no evidence, let alone substantial evidence, to show that any of the Petitioners had an interest in, or even knowledge of,

such a delivery.

Initially, there is insufficient proof of an agreement between the Petitioners. The conspirator must knowingly agree to join others to bring about a common goal. Proof that a defendant may have intentionally aided a criminal act or that he may have intended to do so in the future is insufficient, United States v. Middlebrooks, 618 F.2d 273, Reh. granted, 624 F.2d 36 (5th Cir. 1980), as is proof of a defendant's presence at the scene of the crime. United States v. Caro, 569 F.2d 411, 418 (5th Cir. 1978). Even proof of a defendant's participation in a substantive offense, without more, is insufficient. See Pinkerton v. United States, 328 U.S. 640, 643 (1946).

The evidence in the instant case is susceptible of at least several interpretations. Where evidence in criminal cases is reasonably susceptible of many different interpretations, those cases should not be submitted to the jury; such cases

are appropiate instances for entry of judgments of acquital in order to "avoid the risk that a jury may capriciously find [a defendant] quilty though there is no legally sufficient evidence of his guilt." United States v. Haggins, 545 F.2d 1009 (5th Cir. 1977). Moreover, where there is no evidence that a defendant did anything or said anything, there is nothing from which a reasonable jury can infer entry into, and membership in, a conspiracy, Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969). The submitting of the instant case to the jury, amounted to an unconstitutional deprivation of the Petitioners' rights. The jury was mistakenly allowed to infer a conspiracy from the acts of the Petitioners, in light of the overwhelming lack of legal evidence needed to support the alleged conspiracy.

The Fifth Circuit recently had occasion to reverse convictions for conspiracy to distribute when the evidence supported only a conspiracy to import. In United States

v. Rodriguez, 585 F.2d 1234, (5th Cir. 1978) and United States v. Cadena, 585 F.2d 1252, (5th Cir. 1978), the Fifth Circuit considered the sufficiency claims of defendants involved in a smuggling venture as captain of the freighter involved (Cadena), and so-called "land people" (Rodriguez). In Rodriguez, the court held, as it reversed a conviction for conspiracy to distribute:

> But there is no evidence whatever that, at the time of Martin's and Smigowski's contribution scheme, they knew that a conspiracy to distribute had been formed. Although they may be charged with knowledge that such a scheme would likely be formed once the haul arrived, this is not sufficient to exclude beyond a reasonable doubt the hypothesis that they did not then either join in it or even know of it. 585 F.2d at 1247.

As to the freighter captain, the court held in Cadena as follows:

> As to Cadena . . . there was no evidence that he knew of a distribution scheme when he consigned to import the marijuana. Unlike the situation presented by an ongoing enterprise, Cadena had no intent in or awareness of what plans, if any, had been reached to dispose of the marijuana once

> he reached these shores. Although a conspiracy to import facilitates a conspiracy to distribute, one cannot joint [sic] a conspiracy, whether by conduct or verbal accord, unless one knows that it has in fact, been concocted. 585 F.2d at 1266.

As in Rodriguez and Cadena, there is no evidence that the Petitioners in the instant case knew of any distribution scheme. The government has not shown that the Petitioners were anything more than mere laborers, hired only to expedite the unloading process. The inference of a conspiracy in the instant case, where the evidence failed to show that any distribution scheme existed, or was even contemplated, deprived the Petitioners of their constitutional rights. This court should grant certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

II. RUIZ' SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE TRIAL COURT ALLOWED THE GOVERNMENT TO INTRODUCE TWO GUNS INTO EVIDENCE AGAINST HIM, DESPITE THE LACK OF ANY

ALLEGATION IN THE INDICTMENT PERTAINING TO THE USE OR POSSESSION OF FIREARMS.

Two loaded weapons were introduced into evidence against Ruiz, even though there was no allegation pertaining to the use or possession of firearms. The courts have quite uniformly condemned the introduction into evidence of testimony concerning dangerous weapons, when such evidence has nothing to do with the crime charged. This rule applies even though the defendant possessed the weapon. United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977); citing United States v. Reid, 410 F.2d 1223, 1226-27 (7th Cir. 1969); Thomas v. United States, 376 F.2d 564 (5th Cir. 1967); Moody v. United States, 376 F.2d 525, 532 (9th Cir. 1967); Brubaker v. United States, 183 F.2d 894, 898 (6th Cir. 1960).

Furthermore, the government in the instant case did not present any evidence that Ruiz was either in possession of the weapons

or had any knowledge as to the existence and presence of the weapons in the closet. The arresting officers were unable to unequivocally state that Ruiz was, in fact, reaching for the weapons. The mere fact that Ruiz happened to hide in the closet where the guns were hidden does not impart to them any probative value. Likewise, the mere presence of the guns in the closet does not bestow upon them any relevancy or probative value, especially, in light of the fact that the government failed to present any evidence linking the weapons to Ruiz, such as registration or fingerprints. Because there was a lack of relevancy, the guns were clearly inadmissible. Fed. R. Evid. 402.

Even if some degree of relevancy is attached to the guns, they were nevertheless inadmissible as their slight probative value was outweighed by the great risk of potential prejudice to Ruiz. Fed. R. Evid. 403. This prejudice arose not only from the very nature of the type of evidence,

but from the government's failure to inform the jury that the Avery Road property belonged to Co-defendant Perez. Lacking knowledge of this fact, the jury could have improperly concluded that the guns in the bedroom closet belonged to Ruiz. Moreover, they may have inferred that Ruiz was found in his bedroom, in his house; thus allowing them to draw the further inference that Ruiz was guilty of the crimes charged.

In United States v. Williams, 561 F.2d 859 (D.C. Cir. 1977), a case factually similar to the instant case, the court held that even assuming that part of a quantity of stolen money found in the apartment of the defendant's sister was relevant without a showing of the defendant's access to the apartment, admission of such evidence was error, since the jury was not told that the other occupant of the apartment had admitted to his participation in the robbery. Thus, the failure to apprise the jury in the instant case of the true owner

of the house and the guns constituted an unfair infringement upon Ruiz' constitutional right to a fair trial, as the jury was allowed to make untrue and unwarranted conclusions.

III. RUIZ' SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION FOR SEVERANCE, THUS DEPRIVING HIM OF MATERIAL EXCULPATORY TESTIMONY OF HIS CO-DEFENDANT.

The denial of Ruiz' Motion for Severance rendered his trial fundamentally unfair because it deprived him of material exculpatory testimony of his Co-defendant, Rigoberto Rojas. Tifford v. Wainright, 588 F.2d 957 (5th Cir.), aff'd on rehearing, 592 F.2d 233 (5th Cir. 1979); Byrd v. Wainright, 428 F.2d 1017 (5th Cir. 1970).

Ruiz clearly satisfied the conditions for exculpatory severance set forth in Tifford and Byrd, both supra, by proffering Rojas' testimony taken at the suppression hearing. At that hearing, Ruiz

testified that he had not gone outside the house from the time he arrived at 7:00 p.m., until he was arrested. He said that he had gone into the bedroom about 7:15 p.m. and "just passed out".

Thereafter, upon the urging of the magistrate and after the magistrate had advised the Petitioners' counsel that any testimony offered by the Petitioners' could not be used against them at trial, except for impeachment purposes, Ruiz called Rojas as a witness. Rojas testified that Ruiz arrived, looking and acting "sick", after which he went to bed. Rojas also testified that he assisted Ortiz and Perez in the unloading of the marijuana.

By offering Rojas' testimony taken at the suppression hearing, Ruiz satisfied the requirement of making a clear showing of the nature of the exculpatory testimony, as well as giving it a "stamp of veracity". Byrd v. Wainright, supra, at 1020. Rojas' sworn testimony, containing admissions as

to his own culpability in the off-leading process, subjected to cross-examination by government counsel, and corroborated in part by Ruiz' own testimony at the suppression hearing, was a statement against his own interest, thus carrying its own indicia of reliability. See, Fed. R. Evid. 804 (b) (1), (b) (3). The elicited testimony was both exculpatory and significant, since it demonstrated Ruiz' total lack of participation in, or even knowledge of, the offense for which he stands convicted.

The likelihood of Rojas testifying if a severance had been granted, was demonstrated by his prior act of testifying at the suppression hearing. This prior testimony proved that the possibility of Rojas testifying was "more than a gleam of possibility in the Defendant's eye," Byrd, supra, at 428 F.2d 1022, and that the prejudice resulting from the denial of the Motion to Sever was not speculative. Tifford v. Wainright, supra.

This Court should grant certiorari to review the Fifth Circuit's denial of Ruiz' Motion for Severance, which rendered his trial fundamentally unfair.

IV. THE TRIAL COURT'S ERROR IN SUBMITTING WRITTEN JURY INSTRUCTIONS VIOLATED THE PETITIONERS' SIXTH AMENDMENT FAIR TRIAL RIGHTS.

Over the Petitioners' objections, the trial court submitted written instructions to the jury. The Fifth Circuit has twice expressed its disapproval of this practice. United States v. Hooper, 575 F.2d 496 (5th Cir.), reh. denied, 578 F.2d 871, cert. denied, 99 S.Ct. 256 (1979); United States v. Schileci, 545 F.2d 519 (5th Cir. 1977). The submission of written instructions to the jury was condemned as "conductive to dissection of the charge by the jury and over-emphasis of isolated parts rather than consideration of the charge as a whole". Schilleci, supra,

at 526.

Although the submission of written jury instructions has been found not to constitute an abuse of discretion where the litigation is complex, see United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963), the procedure was especially prejudicial here, where the jury heard argument, testimony, and instructions comprising less than 190 pages of transcript.

This Court should grant certiorari to review the Fifth Circuit's decision so that a uniform procedure for the equitable submission of jury instructions can be set.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-5100

UNITED STATES OF AMERICA, Appellee,

v.

MARIO PEREZ, CARLOS RUIZ, RIGOBERTO ROJAS and ARMANDO ORTIZ, Appellants.

Appeals from the United States District Court for the Southern District of Florida.

James C. Paine, District Judge

Decided: June 15, 1981

Before Dyer, Tjoflat and Fay, Circuit Judges.

Defendants appeal their convictions of conspiracy to distribute marijuana, 21

U.S.C. §846, and possession with intent to distribute marijuana, 21 U.S.C. §841(a)(1). We vacate the special parole term imposed on Perez under count one of the indictment and in all other respects we affirm.

On February 11, 1979, agent Meyers of the Palm Beach Florida Sheriffs office was conducting surveillance at 11317 Avery Road in North Palm Beach. A vessel, The Magnificent, about sixty feet in length, was docked in a canal at the rear of the residence. She was riding low in the water.

About seven-thirty that evening Meyers and agent Osleber of the Drug Enforcement Administration returned to the residence and Osleber smelled marijuana. Both agents heard a whirring noise and proceeded through an adjacent yard where they could view the back yard of the Avery Road residence. With a full moon lighting the area the agents saw a conveyor system running from the window of the vessel to the house. It was equipped with rollers and indoor-outdoor

carpeting. The agents saw Perez at the window of the vessel passing burlap bales of marijuana from the vessel to the conveyor system. Ortiz was standing next to the conveyor system pushing the bales to Rojas, who in turn, pushed the bales to Ruiz, who pushed the bales inside the house. All three men were wearing identical dark blue, short sleeved jumpsuits.

After watching the offloading operation for a few minutes Osleber made a remark to Meyers which was overheard by Perez. Perez immediately indicated to the others to be quiet and the men started to crawl away from the conveyor system.

There was a large clothesline in the backyard with sheets draped over it which screened the conveyor system. The agents appeared and announced that they were law enforcement officers and that everyone was under arrest. Ortiz, who started to run away, was seized and arrested. Meyers held him in custody. Rojas was seen crawling

along the sidewalk and was diving over bale of marijuana in the doorway of the house. Agent Osleber dragged Rojas back to agent Meyers who took custody of him. Osleber then saw Perez dive off the front of the vessel into the canal. As he was swimming away, Osleber pointed his rifle at Perez and ordered him back.

Agent Meyers saw Ruiz run into the house. It was dark except for a green chemical light that had been dropped on the floor. The agents heard noises coming from a bedroom, proceeded there, and announced their presence, but no one emerged. The agents saw Ruiz through a partially opened closet door, crouching and reaching toward the shelf above his head on which was a .30 caliber cut down carbine and a .357 magnum pistol, both loaded. Ruiz was wearing the same blue jumpsuit.

At the time of seizure sixteen bales of marijuana were on the conveyor system, one hundred and one bales were stacked in

the living room, and three hundred and ten bales were still on the vessel. The total weight of all of the marijuana was 18,900 pounds.

All of the defendants concede on appeal that there was sufficient evidence to sustain their convictions under count two of the indictment, possession with intent to distribute marijuana, 21 U.S.C. §841(a)(1). They collectively argue, however, that there was insufficient evidence to support a conviction for the conspiracy charged in count one, and further that it was error for the district court to submit a written copy of its charge to the jury. Perez contends that it was error for the court to exclude his expert witness because Perez' failure to abide by the standing discovery rules, and further that the parole term imposed upon him under count one is invalid. Ruiz asserts that it was error to admit in evidence the weapons found on the closet shelf under which he was hiding, and further that

his motion for for severance should have been granted.

[1] At the outset we agree that Perez' special parole term imposed under count one must be vacated because he received consecutive sentences of two years special parole term on each count. In Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980) the Court held that a special parole term may not be imposed for violations of 21 U.S.C. §846. The concurrent sentence doctrine, United States v. Warren, 612 F.2d 887, 891-896, (5th Cir. 1980) (en banc) makes it unnecessary for us to consider the concurrent special parole term imposed on Ruiz, Rojas and Ortiz.

All of the defendants strongly argue that there was insufficient evidence to prove that they had the required intent to become a member of a conspiracy to distribute the marijuana. While they concede that they were in possession of it, they submit that there is no evidence of a plan to dis-

tribute it. We are unpersuaded. The defendants start with the sound premise that there must be proof beyond a reasonable doubt that a conspiracy existed, that they knew it, and with that knowledge voluntarily joined it. United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978). They argue that on review we must find substantial evidence of the conspiracy as required by United States v. Malatesta, 590 F.2d 1379 (5th Cir. 1979). But they reach an unsound conclusion when they apply the facts to the premise.

[2,3] Intentional participation in a criminal conspiracy need not be proved by direct evidence but may be inferred "from a development and a collocation of circumstances". United States v. Harbin, 601 F.2d 773 (5th Cir. 1979). Here we have the offloading of 18,900 pounds of marijuana from "The Magnificent" in a sophisticated operation utilizing a conveyor belt from the vessel to the house. Three of the defendants

along the belt were dressed in the uniform of the day-dark blue jumpsuits. When Perez gave the alarm that they were being watched the three defendants attempted to flee, while Perez jumped overboard into the canal. The evidence of complicity is overwhelming. The defendants could not, even if they were chain smokers, personally consume this quantity of marijuana in their lifetime. It would be sheer sophistry to say that the defendants had not agreed to distribute the marijuana. In a parallel case where the defendants were similarly charged with conspiracy to distribute, United States v. Mann, 615 F.2d 668 (5th Cir. 1980), the defendants were apprehended with over 22,500 pounds of marijuana in their possession "far too much for the personal consumption of four individuals. Having determined that defendants planned to import their cargo the jury was entitled to infer from the facts before it that some plan had been made for its disposition. As we have previously noted '[t]he

very size of a...cache can be sufficient to show intent to distribute...' United States v. Rodriguez, 585 F.2d 1234, 1236 (5th Cir. 1978) aff'd 612 F.2d 906 (5th Cir. 1980) (en banc); United States v. Perry, 480 F.2d 147 (5th Cir. 1973); United States v. Mather, 65 F.2d 1035 (5th Cir.) cert. denied, 409 U.S. 1085, 93 S.Ct. 685, 34 L.Ed.2d 672 (1972)." The factual picture painted here fits precisely into the frame of a conspiracy to distribute. Viewing the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and accepting all reasonable inferences that support the jury verdict, United States v. Becker, 569 F.2d 951 (5th Cir. 1978), we find substantial evidence that sustains the jury's conclusion that the defendants entered into a conspiracy to distribute the marijuana.

[4] The defendants next argue that the district court, over their objections, submitted written instructions to the jury

after having charged the jury to consider the charges as a whole. While we have condemned the practice, there is no showing that any prejudice resulted because of the submission of written instructions. United States v. Hooper, 575 F.2d 496 (5th Cir. 1978) is a full answer to the contention here made. There we said "The final ground of error put forth by defendant is that the district court incorrectly provided the jury with a written copy of the jury charges. In United States v. Schilleci, 545 F.2d 519 (5th Cir. 1977), this court expressed disapproval of the practice of furnishing the jury with written copies of the jury charge, but stated, however, that the practice was not error in itself'. Id. at 526. As none of the circumstances that created the risk of prejudice in Schilleci is present in this case we reject the defendants' contention." (footnote omitted).

[5] Perez assigns error in the preclusion of his defense witnesss for a vio-

lation of a standing discovery order.[1] He argues that the action taken by the court under Rule 16(d)(2) of the Federal Rules of Criminal Procedure collides with his Fifth Amendment right to due process and his Sixth Amendment right to compulsory attendance of witnesses.

Doctor Antonio Rivero-Setien examined Perez on December 19, 1979. Four days before the trial date, January 3, 1989, the doctor's report was shown to the government. When the doctor was called as a witness by Perez the government's objection to his testimony was that his examination of Perez disclosed that he suffered from "acute back syndrome" and as a result Perez was not able to lift a weight of thirty to fifty pounds.

1. The standing discovery order provides in pertinent part that it shall be the continuing duty for counsel for both sides to immediately reveal to opposing counsel all reports of physical or mental examinations.

However, he equivocated by saying that sometimes Perez had no pain, that "If at that time he was without pain, he would be able to swim." And again, sometimes he has no pain, is in good condition, and does not need crutches. Other times he has been in worse condition, and sometimes moving in the bed suddenly, and so forth, and so his condition can worsen, sometimes."

We entertain no doubt but that Perez' counsel was in violation of the discovery order by waiting from December 19 to December 30, 1979, to disclose the doctor's statement to the government, particularly with the New Years holiday intervening before trial on January 3, 1980. Thus it was within the sound discretion of the district court to mete out appropriate relief. United States v. Bockius, 564 F.2d 1193 (5th Cir. 1977); United States v. Bullock, 551 F.2d 1377 (5th Cir. 1977); Gevinson v. United States, 358 F.2d 761 (5th Cir. 1966); United States v. Saitta, 443 F.2d 830 (5th Cir.),

cert. denied, 404 U.S. 938, 92 S.Ct. 269, 30 L.Ed. 2d 250 (1971). But "the compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants." United States v. Davis, 639 F.2d 239 at 243 (5th Cir. 1981).

It is self evident, however, that this was not a close case. The evidence of guilt was formidable and the doctor's proferred testimony was equivocal-that Perez' back was not always disfunctional. Perez was observed lifting and placing on the conveyor belt bale after bale of marijuana. He jumped into the canal and started to swim away in an attempt to escape. We conclude that although the court should have imposed a lesser sanction than the preclusion of the witness, on the facts and in the circumstances of this case, the failure to do so was harmless error beyond a reasonable doubt. United States v. Arcentales, 532 F.2d 1046

(5th Cir. 1976).

[6] Ruiz asserts error in the denial of his motion for severance arguing that it deprived him of material exculpatory testimony of his codefendant Rojas. At the motion to suppress hearing held on September 4, 1979, prior to the time of trial in January 1980, Ruiz called Rojas as a witness. The magistrate advised counsel that any testimony offered by any of the defendants could not be used against them at trial except as impeachment. Rojas then testified that when Ruiz arrived at the house he looked and acted sick and went to bed shortly thereafter.

No written or oral motion for severance was made or filed by Ruiz at any time before the government rested its case. Then for the first time Ruiz' counsel moved for a judgment of acquittal and for a severance. Ruiz called Rojas as a witness outside the presence of the jury and Rojas stated his intent to invoke his Fifth Amendment rights with regard to all questions put to him con-

cerning the crime. Ruiz then argued that he should be granted a severance or alternatively should be allowed to introduce the former testimony of Rojas. The district court denied the motions.[2] We find no abuse of discretion in the trial court's ruling.

In the seminal case of Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970), we pointed out several areas of inquiry which a trial court should pursue when it is presented with a motion to sever based on the desire to offer exculpatory testimony of a codefendant, among which were "[t]o what extent, and in what manner, must it be shown that if severance is granted there is likelihood that the codefendant will testify." Further, "[w]hat are the demands of effective judicial administration and economy of judicial effort? Related to this is the timeliness in raising the question of severance" (footnote omitted). Addressing these in-

2. Ruiz did not assign as error on appeal the exclusion of the former testimony of Rojas.

quiries in reverse order we find that there was a failure to timely present the motion. Ruiz knew four months in advance of the trial what Rojas testified to on the motion to suppress, yet no motion for severance was made until after the government rested and Ruiz' motion for acquittal had been denied. The motion to sever at this late date was untimely. United States v. Metz, 608 F.2d 147 (5th Cir. 1979). Kolod v. United States, 371 F.2d 983 (10th Cir. 1967). Moreover, Ruiz did not meet the burden of showing that there was a likelihood that Rojas would testify if Ruiz' motion for a severance was granted. "The court is not required to sever when the possibility of the codefendant's testimony is merely colorable or there is no showing than it is anything more than a gleam of possibility in the defendant's eye." Byrd, supra at 1022. The limited testimony of Rojas at the suppression hearing after a promise of immunity from its affirmative use, especially after Rojas'

claim of his Fifth Amendment privilege outside the presence of the jury at the time of trial is a stong indication that Rojas would not have taken the stand if Ruiz had been granted a separate trial.

In a well documented and exhaustive opinion by Judge Thornberry in United States v. Morrow, 537 F.2d 120 (5th Cir. 1976) it was emphasized that "the grant or denial of a motion for severance rests in the sound discretion of the trial judge. Consistent with this discretion, which is necessarily wide, appellants carry a heavy burden to show the denial of their motions for severance also denied them a fair trial. Absent an abuse of discretion, the ruling of the trial judge will not be disturbed on appeal." We find no abuse of discretion here.

[7] Finally Ruiz contends that the two loaded weapons introduced into evidence against him had, at best, only slightly probative value which was outweighed by their potential prejudice. He argues that

prejudice arose both because the government failed to inform the jury that the house belonged to codefendant Perez and because of the inflammatory nature of the weapons themselves. The agents saw Ruiz in a blue jumpsuit (similar to those worn by the others), crouching in the closet and reaching for the shelf above his head where the two loaded guns were located. We are unimpressed with the argument that given these facts it could have made a difference to the jury to know that the house was owned by Perez, not Ruiz. That is beside the point-the point is that Ruiz was there and reaching toward the weapons.

The defendants were unloading 18,900 pounds of marijuana. It is certainly fair to assume that anyone engaging in a transaction of this magnitude would take steps against having the contrabnd or the purchase money stolen. Unites States v. Pentado, 463 F.2d 355 (5th Cir. 1972). Moreover, the agents were entitled, under the circums-

tances, to be apprehensive about their own safety. As the Ninth Circuit said in United States v. Kearney, 560 F.2d 1358 (9th Cir. 1977), "[p]ossession of a firearm demonstrates the likelihood that a defendant took steps to prevent the contraband or money from being stolen." We endorse the Second Circuit's observation that "[e]xperience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales [which were also found in the closet], glassine bags, cutting equipment, and other narcotic equipment." United States v. Wiener, 534 F.2d 15 (2nd Cir. 1976).

The guns were relevant to the issues upon which Ruiz was tried and the district court did not abuse its discretion in holding that their probative weight was not overbalanced by the inflammatory tendency of the guns as evidence. United States v. Ashley, 555 F.2d 462 (5th Cir. 1977). See United

States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc).

The special parole term imposed on Perez under count one of the indictment is vacated. The judgments of conviction are, in all other respects, AFFIRMED.

FAY, Circuit Judge, specially concurring:

I agree wholeheartedly with Judge Dyer's opinion for the court but wish to add this statement regarding the submission of the trial court's charges to the jury. While we are bound by Schilleci as we pointed out in United States v. Johnson, 558 F.2d 744 (5th Cir. 1977), that opinion must be read in light of its very peculiar fact situation and the combination of errors requiring reversal. As noted by Judge Dyer, the language in Schilleci states that the practice is not error in itself. Schilleci does express disapproval of the practice of furnishing the jury with written copies of the jury charge. That precise question has

never been considered by our court en banc.

Personally, I feel the practice of furnishing a copy of the court's instructions to the jury is both sound and proper. Additionally, I seriously doubt that the criticism of the practice found in Schilleci represents the current thinking of most trial and appellate judges within our circuit.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-5100

UNITED STATES OF AMERICA, Appellee,

v.

MARIO PEREZ, CARLOS RUIZ, RIGOBERTO ROJAS and ARMANDO ORTIZ, Appellants.

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Appeal from the United States District Court

for the Southern District of Florida

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ON PETITION FOR REHEARIND AND
SUGGESTION FOR REHEARING EN BANC

(August 10, 1981)

Before Dyer, Tjoflat and Fay, Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.